Sediperak Sdn Bhd v Baboo Chowdhury

HIGH COURT (JOHOR BAHRU) — CIVIL APPEAL NO 12-20 OF 1998
ABDUL MALIK ISHAK J
11 NOVEMBER 1998

Civil Procedure *— Summary judgment — Estoppel — Third party offered to pay sum owed by appellant to respondent — Third party did not honour terms of settlement — Respondent applied for summary judgment — Whether acceptance of payment from third party constituted estoppel or waiver — Whether triable issues raised by appellant*

Civil Procedure *— Summary judgment — No arguable case — Respondent incurred expenses by purchasing banker's cheque — Whether there was suspicion about respondent's claim — Whether sufficient reason to have a trial of the action*

The appellant wanted to recruit 100 Bangladeshi semi-skilled workers as production operators for their factory. The Home Affairs Ministry granted the necessary approvals and levies, amounting to RM126,000, were imposed for the 100 Bangladeshi workers. The respondent obtained a banker's cheque for the sum of RM126,000 in favour of Ketua Pengarah Imigresen. However, the Immigration Department issued a receipt in the name of the appellant. The respondent sent a notice of demand to the appellant claiming the payment of RM126,000, to which the appellant did not respond. The respondent then filed an action in the sessions court.

The respondent's solicitors later said that a third party had offered to settle the sum owed to the respondent. Unfortunately, the third party did not honour the terms and conditions of the settlement and the respondent wrote to the appellant adverting that a default judgment will be applied for if the appellant did not file their notice of appearance and defence. The appellant resisted the application by the respondent for summary judgment and in their affidavits, they admitted that payment of the RM126,000 was made on their behalf but denied that it was on their request. In the alternative, it was alleged that if the appellant was liable, the fact that the respondent agreed to accept payment from the third party constituted estoppel or waiver of the respondent's right to proceed against the appellant. The sessions court granted the respondent summary judgment. The appellant appealed.

Held, dismissing the appeal:

(1) It was the offer of settlement by the third party which did not materialize as certain terms and conditions were not fulfilled. The respondent cannot be estopped from proceeding with his claim against the appellant and consequently, there was no waiver on his part at all. Further, the respondent's solicitors' notice of demand was not replied by the appellant at all. If the allegations by the appellant were true, it would certainly be reasonable to expect vigorous denial by the appellant.

The facts in the present appeal were plain and straightforward. There was no material for investigation by resorting to an open court hearing and it was certainly a fit case for summary decision (see pp 243C–D and 245G); *Kiwi Brands (M) Sdn Bhd v Multiview Enterprises Sdn Bhd* [1998] 6 MLJ 38 followed.

(2) In the present appeal, there was no suspicion about the respondent's claim that constituted sufficient reason for there to be a trial of the action. The fact that the respondent incurred expenses by purchasing the banker's cheque in the name of Ketua Pengarah Imigresen for the benefit of the appellant could not be doubted at all (see p 245I); *Miles v Bull* [1968] 3 All ER 632 distinguished.

[Bahasa Malaysia summary

Perayu hendak merekrut 100 orang pekerja separuh mahir berbangsa Bangladesh sebagai operator pengeluaran di kilang mereka. Kementerian Hal-Ehwal Dalam Negeri telah memberikan kebenaran-kebenaran yang perlu dan levi-levi berjumlah RM126,000 telah dikenakan terhadap 100 orang pekerja Bangladesh tersebut. Penentang telah mendapatkan cek bank untuk jumlah sebanyak RM126,000 yang ditujukan kepada Ketua Pengarah Imigresen. Walau bagaimanapun, Jabatan Imigresen telah mengeluarkan resit di atas nama penentang. Penentang telah menyampaikan satu notis tuntutan kepada perayu menuntut sejumlah RM126,000, di mana perayu telah tidak memberikan sebarang respon. Penentang kemudiannya telah memfailkan satu tindakan di mahkamah sesyen.

Peguamcara-peguamcara penentang telah kemudiannya menyatakan bahawa seorang pihak ketiga telah menawarkan untuk menyelesaikan jumlah yang terhutang kepada penentang itu. Malangnya, pihak ketiga tersebut tidak menepati terma-terma dan syarat-syarat penyelesaian dan penentang telah menulis kepada perayu menyatakan bahawa satu penghakiman ingkar akan dipohon jika perayu tidak memfailkan notis kehadiran dan pembelaan mereka. Perayu telah menentang permohonan penentang untuk penghakiman terus dan di dalam afidavit mereka, mereka mengakui bahawa pembayaran RM126,000 itu telah dibuat bagi pihak mereka tetapi menafikan bahawa ia dilakukan di atas permintaan mereka. Sebagai alternatif, telah dinyatakan bahawa jika perayu dipertanggungjawabkan, persetujuan penentang untuk menerima pembayaran daripada pihak ketiga telah mewujudkan estopel atau penepian terhadap hak penentang untuk meneruskan tindakan terhadap perayu. Mahkamah sesyen telah memberikan kepada penentang penghakiman terus. Perayu telah membuat rayuan.

Diputuskan, menolak rayuan:

(1) Yang tidak menjadi kenyataan adalah tawaran untuk penyelesaian oleh pihak ketiga memandangkan terma-terma dan syarat-syarat tertentu tidak dipenuhi. Penentang tidak boleh diestop daripada

meneruskan tuntutannya terhadap perayu dan oleh itu, tidak terdapat penepian pada pihaknya langsung. Tambahan pula, notis tuntutan peguamcara-peguamcara penentang tidak dijawab langsung oleh perayu. Jika tuduhan-tuduhan oleh perayu itu adalah benar, adalah munasabah untuk menjangka penafian yang bersungguh-sungguh daripada perayu.

Fakta-fakta di dalam rayuan ini adalah jelas dan mudah. Tiada perkara-perkara yang perlu kepada siasatan dengan merujuk kepada perbicaraan di mahkamah terbuka dan ia adalah pastinya satu kes yang sesuai untuk keputusan terus (lihat ms 243C–D dan 245G); *Kiwi Brands (M) Sdn Bhd v Multiview Enterprises Sdn Bhd* [1998] 6 MLJ 38 diikut.

(2) Di dalam rayuan ini, tidak terdapat sebarang kesangsian tentang tuntutan penentang yang telah mewujudkan alasan mencukupi untuk mengadakan satu perbicaraan bagi tindakan tersebut. Kenyataan bahawa penentang telah mengeluarkan perbelanjaan dengan membeli cek bank di atas nama Ketua Pengarah Imigresen untuk faedah perayu tidak boleh diragukan langsung (lihat ms 245I); *Miles v Bull* [1968] 3 All ER 632 dibeza.]

Notes

For cases on estoppel pleaded to raise triable issues in denying summary judgment, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4535–4538.

For cases on where it is proper to grant summary judgment as no triable issues raised, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4628–4632.

Cases referred to

A-G of Hong Kong & Anor v Humphreys Estate (Queen's Garden) Ltd [1982] AC 114 (refd)

Amalgamated Investment & Property Co Ltd (In Liquidation) v Texas Commerce International Bank Ltd [1982] QB 85 (refd)

Aw Yong Wai Choo & Ors v Arief Trading Sdn Bhd & Anor [1992] 1 MLJ 166 (refd)

Central London Property Trust Ltd v High Trees House Ltd [1947] KB 130 (refd)

Daimler Co Ltd v Continental Tyre & Rubber Co (Great Britain) Ltd [1916] 2 AC 307 (refd)

Harrison v Bottenhelm (1878) 26 WR 362 (refd)

Jacobs v Booth's Distillery Co (1901) 85 LT 262 (refd)

Kenneth Allison Ltd & Ors v AE Limehouse & Co (a firm) [1991] 3 WLR 671 (refd)

Kiwi Brands (M) Sdn Bhd v Multiview Enterprises Sdn Bhd [1998] 6 MLJ 38 (folld)

Kuan Leong Hin v State of Johore [1941] 231 (refd)

Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd [1987] 2 MLJ 183 (refd)

Miles v Bull [1968] 3 All ER 632 (distd)
Mohamed Yusoof v Murugappa Chettiar [1941] MLJ 240 (refd)
New Kok Ann Realty Sdn Bhd v Development and Commercial Bank Ltd, New Hebrides (In Liquidation) [1987] 2 MLJ 57 (refd)
Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd & Ors [1991] 1 CLJ 776 (refd)
Perak Iron Mining Co Ltd v Chong Voon Kim [1962] MLJ 270 (refd)
Poomani v Associated Finance Corp Sdn Bhd [1975] 1 MLJ 277 (refd)
Siow Wong Fatt v Susur Rotan Mining Ltd & Anor [1967] 2 MLJ 118 (refd)
State of UP v Chandra Gupta & Co [1977] AA 28 (refd)
State of West Bengal v BK Mondal [1962] Supp 1 SCR 376 (refd)
Syarikat Kerjasama Serbaguna Tunas Muda Sungai Ara v Ghazali bin Ibrahim [1985] 2 MLJ 225 (refd)
Tan Lay Soon v Kam Mah Theatres Sdn Bhd (Malayan United Finance Bhd, Interverner) [1992] 2 MLJ 434 (refd)

Legislation referred to

Contracts Act 1950 s 71
Contract Act (India) s 70
Contract Enactment (Cap 52) s 70
Rules of the High Court 1980 O 14
Subordinate Courts Rules 1980 O 26A r 1(1)

Mathews George (Danaraj Mathews Jimmy & Sara) for the appellant.
Atikah binti Osman (Mak Ng Shao & Kee) for the respondent.

Abdul Malik Ishak J: This was the respondent's application for summary judgment under O26A of the Subordinate Courts Rules 1980 ('the SCR') against the appellant for the refund of a sum of RM126,000 being the sum paid by respondent to the Immigration Department on behalf and at the request of the appellant. The affidavit of the respondent that was affirmed on 13 March 1997 showed that only RM10,000 had been refunded leaving a sum of RM116,000 that was still due and owing. That application for summary judgment was heard by the Johor Bahru Sessions Court (No 2) ('the trial court') and the trial court granted the application in favour of the respondent. Being aggrieved, the appellant now appeals.

Within a short compass, the facts may be stated thus. The appellant was desirous of recruiting 100 (one hundred) Bangladesh semi-skilled workers as production operators for their factory in Jalan Dato Abdullah Tahir, Johor Bahru and for this purpose the appellant wrote a letter to an agent in Dhaka and that letter, which was undated, was worded thus :

Sediperak Sdn Bhd
Kilang Johor Bahru
14A, Jalan Dato Abdullah Tahir,
80300 Johor Bahru, Malaysia

A Tel: 337746, 325727

Your Ref: Our Ref: Date: ...

Hoque Overseas Ltd,
House No 41, Road No 17,
Bamami, D–1213.

B

Dear Sir,

Re: Letter of demand for Bangladesh semi-skilled workers

C We are pleased to inform you that we have decided to recruit the workers from Bangladesh for our factory on the basis of the approval (here no mention from where the approval came from). The terms and conditions of the recruitment and employment of the workers are as follows:

Category of workers:	Production operators (semi-skilled)
D Number of workers:	100 workers

Terms & Conditions

1	Salary & wages	:	RM400 per month.
E 2	Working Hours	:	48 hours a week and six days a week.
3	Overtime	:	Based on company present rule.
4	Shift Allowance	:	Based on company present rule.
5	Attendance Allowance	:	Based on company present rule.
F 6	Food Allowance	:	Workers' own.
7	Lodging	:	Provided by the employer (free) with water and electricity.
8	Medical/Insurance	:	Provided by the employer (free).
G 9	Levy	:	Advance by the employer and deductable.
10	Security bond PL (KS)	:	To be provided by the employer and not deductable.
11	Air Fare	:	Inward flight passage to be borned by the employee from Dhaka to Malaysia. Return flight passage to be borned by the employer upon completion of contract period.
H 12	Period of contract	:	Two years contract and renewable.
I 13	Other amenities	:	Bed, mattress and cooking utensils will be borned by the employer (free).

All other terms and conditions will be as per the company's rules and regulations and Malaysian labour laws. A

Thanking you.

Yours faithfully,

B

Sgd (Illegible)

.....

Sediperak Sdn Bhd

C

Of course, to realize their dream of recruiting the Bangladesh workers, the appellant wrote to the Home Affairs Ministry, foreign workers division, for the necessary approvals. In due course, the necessary approvals were granted and that was clearly conveyed in writing by letter dated 15 February 1996 from the Home Affairs Ministry. That letter was worded in perfect Bahasa Malaysia: D

Pasukan Petugas Pekerja Asing,
Kementerian Dalam Negeri,
Aras 2, Blok 'K' (Selatan), E
Pusat Bandar Damansara, Tel: 03-2524652
50546 Kuala Lumpur. Fax: 03-2524649

Ruj Tuan:
Ruj Kami: KDN/PPPA:(S)229/857 F
2–1350 (3)
Tarikh : 15 Februari 1996

Pengurus,
Sediperak Sdn Bhd, G
No 14–A, Jalan Dato Abdullah Tahir,
80300 Johor Bahru, Johor.

Tuan, H

Kelulusan Pengambilan Pekerja Asing

Saya merujuk kepada surat tuan bertarikh 31 Oktober 1995 mengenai perkara di atas dan memaklumkan bahawa permohonan syarikat tuan telah diluluskan dengan syarat-syarat seperti berikut: I

A (i) Jawatan: Penjahit.

(ii) Bilangan diluluskan: 100 orang.

(iii) Warganegara: Bangladesh.

(iv) Tempoh membawa masuk: Dalam masa 4 bulan dari tarikh kelulusan ini.

B (v) Tempoh dibenarkan bekerja: 3 tahun /mengikut kontrak.

(vi) Tempat tinggal pekerja hendaklah disediakan.

2 Syarikat tuan juga dikehendaki menjelaskan dengan sepenuhnya kepada Jabatan Imigresen Negeri Johor dalam tempoh 30 hari dari tarikh surat ini dengan bayaran-bayaran seperti berikut:

C (i) Wang cagaran: RM500 (surat jaminan bank) bagi setiap pekerja.

(ii) Bayaran levi: RM1,200 setahun bagi setiap pekerja.

(iii) Pas lawatan kerja sementara: RM60 setahun bagi setiap pekerja.

3 Syarat-syarat lain yang majikan dikehendaki mematuhi adalah seperti di lampiran 'I' dan 'II'.

D 4 Sukacita saya mengambil perhatian tuan bahawa khidmat mana-mana individu (kecuali pegawai syarikat tuan) atau organisasi/pertubuhan (kecuali PPPA dan agen kerajaan negara sumber) adalah tidak dibenarkan sama sekali.

5 Sila hubungi Jabatan Imigresen Negeri Johor bagi urusan membuat pembayaran.

E 6 Tuan tidak lagi disyaratkan menghantar pulang PTI di Depo Imigresen ke negara asal mereka.

7 Tuan akan dinasihatkan bila kelulusan membawa masuk pekerja asing akan dilaksanakan, iaitu melalui salinan surat kelulusan PPPA kepada BOESL di Bangladesh.

F Sekian, terima kasih.

Saya yang menurut perintah,

Sgd (Illegible)

G (Dato' Tengku Zaman bin Tengku Hariff)

Ketua Pengarah,

Pasukan Petugas Pekerja Asing,

bp Ketua Setiausaha,

Kementerian Dalam Negeri

H

sk

Ketua Pengarah Imigresen,

Jabatan Imigresen Malaysia,

Blok I, Pusat Bandar Damansara,

I 50550 Kuala Lumpur

(U/p: Encik Shafiee bin Hailani) A

— Untuk makluman/rekod.

Pengarah Imigresen Negeri,
Jabatan Imigresen Negeri Johor,
Blok B, Tingkat 1, B
Wisma Persekutuan,
Jalan Air Molek,
80550 Johor Bahru,
Johor.

— Sila maklum kepada PPPA dengan fax pada hari bekerja berikut dari tarikh majikan membayar levi serta mengemukakan salinan resit-resit bayaran. C

The necessary approvals described the post to be held by the 100 Bangladesh workers, in plain language, as 'seamstress'. *The Shorter Oxford English Dictionary* (3rd Ed), defines 'seamstress' as 'a woman who seams or sews; a needlewoman whose occupation is plain sewing.' I wonder why must the factory in Johor Bahru seek foreign workers in its tailoring division. D Surely there are plenty of Malaysians who are interested in taking up this line of occupation. The Home Affairs Ministry was indeed magnanimous as the approval was granted for a period of three years and not two as requested. Be that as it may, the Home Affairs Ministry imposed levies for those 100 Bangladesh workers — a sure source of revenue for the country. E It came up to a figure of RM126,000 and the respondent was the one responsible for paying that amount to the Immigration Department. The respondent obtained a banker's cheque for the sum of RM126,000 with an additional commission of RM2 from Malayan Banking Bhd, Taman Pelangi, Johor Bahru in favour of 'Ketua Pengarah Imigresen' as reflected in exh marked 'BC3' which was annexed to the affidavit of the respondent F that was deposed on 13 March 1997. The Immigration Department issued a receipt not in the name of the respondent but rather in the name of the appellant — Sediperak Sdn Bhd and Lai Kee Kong (see exh 'BC3' of the respondent's affidavit affirmed on 13 March 1997). The respondent through their solicitors sent a notice of demand for the payment of G RM126,000 by letter dated 19 November 1996, but unfortunately there was no response. The appellant played possum. This prompted the respondent to file the action dated 1 January 1997 in the Johor Bahru Sessions Court (see pp 11 and 12 of the appeal record in encl 6).

By a letter dated 24 January 1997, the respondent's solicitors, Messrs Mak, Ng, Shao & Kee, conveyed a message to the appellant to the effect H that a third party by the name of Wan Mei Ling had offered to settle the sums owed to the respondent on certain terms and conditions. For a consistent flow of the facts and to understand the flow of events, that letter is now reproduced:

Mak, Ng, Shao & Kee, I
Peguambela dan Peguamcara,
Advocates & Solicitors,

A 1, Jalan Kuning 1,
Taman Pelangi,
80400 Johor Bahru,
Johor, Malaysia.
Tel:07-3341922
B (6 Lines)
Fax:07-3341722/
07-3341477

Your Ref:
C Our Ref:NSB/AO/9338/96

Date:24 January 1997By Hand

Sediperak Sdn Bhd,
No 14A, Jalan Dato Abdullah Tahir,
D 80300 Johor Bahru.

Re:Johor Bahru Sessions Court
Summons No 52–8 of 1997 (2)
Baboo Chowdhury v Sediperak Sdn Bhd

We refer to the above matter.
E

A third party, namely Wan Mei Ling, has offered to settle the matter on the following terms and conditions:

1 To pay to us cash RM10,000 on 22 January 1997;

2 To pay RM30,000 on or before 30 January 1997 vide KYBB cheque No 004516 dated 30 January 1997 for RM30,000;

F 3 To pay RM15,000 on or before 24 February 1997 vide KYBB cheque No 004517 dated 24 February 1997 for RM15,000;

4 To pay RM15,000 on or before 24 March 1997 vide KYBB cheque No 004518 dated 24 March 1997 for RM15,000;

5 To pay RM10,000 on or before 31 March 1997 vide KYBB cheque No 004519 dated 31 March 1997 for RM10,000; and
G

6 To pay RM10,000 on or before 7 April 1997 vide KYBB cheque No 004520 dated 7 April 1997 for RM10,000.

The third party has also offered to pay party to party costs of RM1,500.

We are prepared to accept the aforesaid offer subject to the following terms and conditions:
H

1 All the aforesaid cheques must be honoured as and when they are due for payment. In the event of default in any of the aforesaid instalment payments, then all the outstanding balance shall become due and payable forthwith without further demand and the plaintiff shall be entitled to claim for the full debt of RM126,000 instead of the proposed settlement sum of RM90,000;
I

2 The plaintiff shall also be entitled to claim for all further party to party costs arising from the default in any of the aforesaid instalment payments;

3 The plaintiff shall adjourn the matter to 14 April 1997 for further mention;

4 Upon the payment of all the aforesaid cheques mentioned aforesaid and including the proposed payment of the party to party costs of RM1,500 without any default whatsoever, the plaintiff shall discontinue the matter.

Kindly let us know by writing within ten (10) days from the date hereof as to whether you are agreeable to the aforesaid proposals.

Yours faithfully,

Sgd (Illegible)
cc Client.

It was rather unfortunate that Wan Mei Ling did not honour the terms and conditions as alluded to above, and on 3 February 1997, the respondent's solicitors wrote a letter to the appellant and adverted to the fact that the respondent would be asking for default judgment if notice of appearance and defence were not filed by the appellant. That letter was worded thus:

Mak, Ng, Shao & Kee,
Peguambela dan Peguamcara,
Advocates & Solicitors,

1, Jalan Kuning 1,
Taman Pelangi,
80400 Johor Bahru,
Johor, Malaysia.
Tel:07–3341922
(6 Lines)
Fax: 07–3341722/
07–3341477

Your Ref:
Our Ref: NSB/AO/9338/96
Date: 24 January 1997By Fax/Registered

Sediperak Sdn Bhd,
No 14A, Jalan Dato Abdullah Tahir,
80300 Johor Bahru.

(Att: Mr Cheng Hung Ming)

Dear Sir,
Re: Johor Bahru Sessions Court
Summons No 52–8 of 1997 (2)
Baboo Chowdhury v Sediperak Sdn Bhd

We refer to our earlier letter to you dated 24 January1997.

We write to inform you that the Kwong Yik Bank Bhd cheque No 004516 for the sum of RM30,000 dated 30 January 1997 which was issued and tendered to us by Wan Wei Ling was dishonoured upon presentation for payment with the reason being 'refer to drawer'.

A We shall be proceeding to enter default judgment against you on 3 March 1997 if no notice of appearance and defence are entered by you before the said mention date.

Yours faithfully,

B

Sgd (Illegible)

cc Client.

The appellant resisted the application by the respondent for summary judgment and two affidavits were filed by Lai Kee Kong, one affirmed on C 3 May 1997 and the other on 1 July 1997. Briefly, by those affidavits the appellant admitted that the payment of RM126,000 to the 'Ketua Pengarah Imigresen' was made on their behalf but denied that it was at their request. It was alleged that that payment was made at the behest of a company known as Tenagaria and one Wan Wei Ling — described as the employee of Tenagaria. In the alternative, it was alleged that if the appellant was D liable, then the fact that the respondent agreed to accept payment from Wan Wei Ling constituted estoppel or waiver of the respondent's right to proceed against the appellant. At p 44 of the appeal record in encl 6, a letter from Tenagaria marked as exh 'L1' was enclosed. That letter was not a letter from Tenagaria to the respondent. It was in fact addressed to D & P Sdn Bhd, 14A, Jalan Dato Abdullah Tahir, Johor Bahru, Johor and in this letter E Tenagaria offered to pay the levy and 'PLKS' charges in respect of the 100 Bangladesh workers that the appellant was desirous of bringing into the country. It was wrong to say that this letter was a letter from Tenagaria to the respondent requesting the latter to make the payment to the Immigration Department. For brevity, that letter was worded thus :

F Perniagaan Tenagaria

No 306, Jalan Simbang,Tel: 07-2387925

Taman Perling,Fax: 07-2387139

81200 Johor Bahru,

G Johor Darul Ta'zim.

D & P Sdn Bhd,

14A, Jalan Dato Abdullah Tahir,

Johor Bahru, Johor.

H Dear Sir,

Re : Recruitment of 100 workers (Bangladeshi)

With reference to the discussion between your goodself and the undersigned, we append below the details for your reference and confirmation:

I (1) We shall at our cost to (get) ready the bank guarantee and insurance coverage for the 100 workers.

(2) We shall advance the payment of Levy (RM1,200) and PLKS (RM60) for each worker amounting to RM126,000 to the Immigration

Department in Johor Bahru. The company will deduct the Levy and PLKS amounting to RM1,260 (each and individual worker) for a period of 12 months ie RM105 per month and remit to us on a monthly basis. The company will not be responsible for any worker who abscond thereof.

(3) We shall at our cost provide the necessary sleeping materials ie sleeping bed, mattress, pillow and blanket for the 100 Bangladeshi workers on or before the arrival of same.

(4) We shall provide the flight ticket lodging and food for three persons from the company to complete the interview to be held in Dhaka, Bangladesh.

(5) Upon arrival of the workers, we shall at our cost to receive and transport the workers from the Subang Airport Kuala Lumpur to the factory.

We trust the above meet with your requirement and look forward to your immediate action.

Thank you.

Yours faithfully,
Perniagaan Tenagaria,

Sgd (Illegible)
Mr Lau Ah Ter
Manager

Now, in so far as Wan Mei Ling's offer to settle the sum claimed as alluded to in the letter of Messrs Mak, Ng, Shao & Kee as reproduced in the early part of this judgment, it was of no help to the appellant at all. That offer did not materialize. There was no concrete evidence to show that Wan Mei Ling was an employee of the appellant as alleged by the appellant. Of pertinence to note would be the absence of an express averment by the appellant in their affidavits that they did not ask the respondent to advance the sum of RM126,000 to the Immigration Department. Surprisingly, there was not a single affidavit emanating from either Tenagaria or Wan Mei Ling to lend support to the appellant in their hour of need. In the circumstances, how could there be an estoppel on the part of the respondent when the purported payment from Wan Wei Ling did not materialize. There was also no waiver on the part of the respondent to proceed against the appellant to recover RM126,000. Moreover, a perusal of the letter from Messrs Mak, Ng, Shao & Kee advocates and solicitors dated 24 January 1997 as reproduced above showed that the respondent was prepared to accept the offer of settlement by Wan Mei Ling on certain terms and conditions, foremost being that there must not be default in instalment payments and if there were then 'all the outstanding balance shall become due and payable forthwith without further demand' and the respondent 'shall be entitled to claim for the full debt of RM126,000 instead of the proposed settlement sum of RM90,000'. Events showed that Wan Mei Ling did not honour that offer at settlement. Surely the respondent cannot be estopped by an offer that never materialize and he cannot be said to have waived his right to claim RM126,000 from the appellant. In *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, the defendants argued that the

A plaintiffs were estopped by their letter reducing the rent and that they could not claim the full rent or had waived their right to do so. At pp 134 to 135 of the the report, Denning J (as he then was) said, in graphic words:

> With regard to estoppel, the representation made in relation to reducing the rent, was not a representation of an existing fact. It was a representation, in effect, as to the future, namely, that payment of the rent would not be enforced at the full rate but only at the reduced rate. Such a representation would not give rise to an estoppel, because, as was said in *Jorden v Money* [1854] 5 HLC 185, a representation as to the future must be embodied as a contract or be nothing.
>
> But what is the position in view of developments in the law in recent years? The law has not been standing still since *Jorden v Money*. There has been a series of decisions over the last fifty years which, although they are said to be cases of estoppel are not really such. They are cases in which a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made, and which was in fact so acted on. In such cases the courts have said that the promise must be honoured. The cases to which I particularly desire to refer are: *Fenner v Blake* [1900] 1 QB 426, *In Re Wickham* (1917) 34 TLR 158, *Re William Porter & Co Ltd* [1937] 2 All ER 361 and *Buttery v Pickard* [1946] WN 25. As I have said they are not cases of estoppel in the strict sense. They are really promises — promises intended to be binding, intended to be acted on, and in fact acted on. *Jorden v Money* can be distinguished, because there the promisor made it clear that she did not intend to be legally bound, whereas in the cases to which I refer the proper inference was that the promisor did intend to be bound. In each case the court held the promise to be binding on the party making it, even though under the old common law it might be difficult to find any consideration for it. The courts have not gone so far as to give a cause of action in damages for the breach of such a promise, but they have refused to allow the party making it to act inconsistently with it. It is in that sense, and that sense only, that such a promise gives rise to an estoppel. The decisions are a natural result of the fusion of law and equity: for the cases of *Hughes v Metropolitan Ry Co* (1877) 2 App Cas 439 at p 448, *Birmingham and District Land Co v London & North Western Ry Co* (1888) 40 Ch D 268 at p 286 and *Salisbury (Marquess) v Gilmore* [1942] 2 KB 38 at p 51, afford a sufficient basis for saying that a party would not be allowed in equity to go back on such a promise. In my opinion, the time has now come for the validity of such a promise to be recognized. The logical consequence, no doubt is that a promise to accept a smaller sum in discharge of a larger sum, if acted upon, is binding notwithstanding the absence of consideration: and if the fusion of law and equity leads to this result, so much the better. That aspect was not considered in *Foakes v Beer* (1884) 9 App Cas 605. At this time of day however, when law and equity have been joined together for over 70 years, principles must be reconsidered in the light of their combined effect.

Further down the same page of the same judgment and spilling over to p 136, Denning J (as he then was) continued solemnly:

> I am satisfied that a promise such as that to which I have referred is binding and the only question remaining for my consideration is the scope of the promise in the present case. I am satisfied on all the evidence that the promise here was that the ground rent should be reduced to 1,250*l* a year as a temporary expedient while the block of flats was not fully, or substantially fully

let, owing to the conditions prevailing. That means that the reduction in the rent applied throughout the years down to the end of 1944, but early in 1945 it is plain that the flats were fully let, and, indeed the rents received from them (many of them not being affected by the Rent Restrictions Acts), were increased beyond the figure at which it was originally contemplated that they would be let. At all events the rent from them must have been very considerable. I find that the conditions prevailing at the time when the reduction in rent was made, had completely passed away by the early months of 1945. I am satisfied that the promise was understood by all parties only to apply under the conditions prevailing at the time when it was made, namely, when the flats were only partially let, and that it did not extend any further than that. When the flats became fully let, early in 1945, the reduction ceased to apply.

In those circumstances, under the law as I hold it, it seems to me that rent is payable at the full rate for the quarters ending 29 September and 25 December 1945.

If the case had been one of estoppel, it might be said that in any event the estoppel would cease when the conditions to which the representation applied came to an end, or it also might be said that it would only come to an end on notice. In either case it is only a way of ascertaining what is the scope of the representation. I prefer to apply the principle that a promise intended to be binding, intended to be acted on and in fact acted on, is binding so far as its terms properly apply. Here it was binding as covering the period down to the early part of 1945, and as from that time full rent is payable.

I therefore give judgment for the plaintiff company for the amount claimed.

When Lord Denning MR retired as the Master of the Rolls in September 1982, he sets out the doctrine of estoppel in these immortal words in the case of *Amalgamated Investment & Property Co Ltd (In Liquidation) v Texas Commerce International Bank Ltd* [1982] QB 85 ('*Amalgamated Investment*') particularly at p 122 of the report:

> The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption — either of fact or of law — whether due to misrepresentation or mistake makes no difference — on which they have conducted the dealings between them — neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

It is interesting to note that *Amalgamated Investment* was approved by the House of Lords in *Kenneth Allison Ltd & Ors v AE Limehouse & Co (a firm)* [1991] 3 WLR 671 and the Privy Council in *AG of Hong Kong & Anor v Humphreys Estate (Queen's Garden) Ltd* [1982] AC 114.

Spencer Bower and Turner, *Estoppel by Representation* (3rd Ed) 1977 at p 157, in classical style described estoppel as follows:

> This form of estoppel is founded not on a representation of fact made by a representor and believed by the representee but on an agreed statement of facts the truth of which has been assumed, by the convention of the parties, as the basis of a transaction into which they are about to enter. When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped against the other from questioning the truth of the statement of facts so assumed.

What was the given state of facts here? It was the offer of settlement by Wan Mei Ling which did not materialize as certain terms and conditions were not fulfilled. The respondent cannot be estopped from proceeding with his claim against the appellant and, consequently, there was no waiver on his part at all. Of significance too would be the fact that the respondent's solicitors' notice of demand as adverted to earlier was not replied by the appellant at all. If indeed the allegations by the appellant were true, it would certainly be reasonable to expect prompt and vigorous denial by the appellant. There was no promptitude here.

From these facts, there certainly cannot be said to be a triable defence for the appellant to hang onto. As Mohamed Dzaiddin J (now FCJ) once said in *Syarikat Kerjasama Serbaguna Tunas Muda Sungai Ara v Ghazali bin Ibrahim* [1985] 2 MLJ 225 at p 226:

> The issue here is whether or not there is a triable defence. This simply means that it is for the defendant to show on merits, he has a good defence to the claim, or that a difficult point of law is involved, or the dispute is as to the fact which is to be tried or any other circumstances showing reasonable grounds of a bona fide defence (see: *The Supreme Court Practice 1985* Vol 1 – 'Defence showing cause' at p 137).

In my judgment, there was no necessity to proceed to trial. From the affidavits, the liability of the appellant can be garnered without any difficulty at all. In the words of Mohamed Dzaiddin J (now FCJ) in the same case at p 226 right hand column between F to I:

> However, in my opinion, this is essentially a case where the triability of the issue depends upon evidence as opposed to law. The facts and circumstances as deposed and found in the affidavits filed therein are sufficient to settle the issue. Here I would adopt the statement in the judgment of Ackner LJ in *Banque de Paris v de Naray* [1984] 1 Lloyd's Rep 23 to the following effect:
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> > 'It is of course trite law that O 14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, ipso facto, provide leave to defend; the court must look at the whole situation and ask itself whether the defendant has satisfied the court that there is a fair or reasonable probability of the defendant's having a real or bona fide defence.'
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> Thus, from the facts and circumstances of the case as a whole, I am satisfied that the defendant has failed to show a bona fide defence to the claim. Therefore, I make an order in terms of prayers 1, 3 and 4 of this application.

It is now opportune to examine the facts in *Syarikat Kerjasama Serbaguna Tunas Muda Sungai Ara v Ghazali bin Ibrahim*. There the plaintiff claimed that the defendant was a trespasser who wrongly erected the unnumbered premises on part of the plaintiff's land. The defendant denied this in his statement of defence of 28 July 1979. He averred that he constructed his premises on a portion of land which belonged to his mother. The same averment was repeated in the affidavit of the mother. She stated that she gave consent to the defendant to construct the premises on a portion of her land which she purchased from the plaintiff. The facts revealed, however, that the land had not been subdivided. From the survey plan made by one Syarikat Ayob, it was found by his Lordship that the defendant's premises was constructed on part or portion of the plaintiff's land. There was nothing to indicate on the survey plan that the said premises was built on the portion which the defendant's mother had alleged to have been alienated to her by the plaintiff. His Lordship also found as a fact that the defendant's mother was not the registered proprietor of any of the portion of land belonging to the plaintiff. His Lordship rightly held that the case revolved on the facts rather than the law and that the defendant had failed to show a bona fide defence to the claim.

I have said something about the principles of summary judgment in *Kiwi Brands (M) Sdn Bhd v Multiview Enterprises Sdn Bhd* [1998] 6 MLJ 38 at pp 44 and 45 in these words:

> Summary judgment is only given in a plain and obvious case. Raja Azlan Shah CJ (Malaya) (as his Majesty then was) in the case of *Fadzil bin Mohamed Noor v Universiti Teknologi Malaysia* [1981] 2 MLJ 196, particularly at p 199 aptly said:
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> > 'An O 14 order in the view we have always taken of it is a very stringent procedure because it shuts the door of the court to the defendant. The jurisdiction ought only to be exercised in proper cases.'
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> Order 14 r 3(1) of the RHC in strong language provides that summary judgment is to be refused where the court is satisfied that: 'there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim'.
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> The phrase 'there ought for some other reason to be a trial' was inserted in O 14 r 3(1) of the RHC to bring and ensure that justice is done to all parties. Megarry J in *Miles v Bull* [1968] 3 All ER 632 especially at p 637 of the report had this to say of that phrase:
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> > 'These last words seem to me to be very wide. They also seem to have special significance where (as here) most or all of the relevant facts are under the control of the plaintiff, and the defendant would have to seek to elicit by discovery, interrogatories and cross-examination those which will aid her. If the defendant cannot point to a specific issue which ought to be tried, but nevertheless satisfies the court that there are circumstances that ought to be investigated, then I think those concluding words are invoked. There are cases when the plaintiff ought to be put to strict proof of his claim, and exposed to the full investigation possible at a trial; and in such cases it would, in my judgment, be wrong to enter summary judgment for the plaintiff.'
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> In *Concentrate Engineering Pte Ltd v United Malayan Banking Corp Bhd* [1990] 3 MLJ 1, the court there held that the circumstances and audacity with which the fraud was carried out and the absence of an explanation by the directors

A of the plaintiffs constitute 'some other reason' for a trial in terms of O 14 r 13(1) of the RHC.

Richard Talalla J in *Overseas-Chinese Banking Corp Ltd v Banhenly Holdings Sdn Bhd & Ors* [1993] 2 CLJ 347 at p 350 remarked:

> 'As I see it, O 14 r 3(1) of the Rules of the High Court 1980 provides for leave to defend to be given in the application for summary judgment where there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial. I have in mind the case [of] *Miles v Bull* [1969] 1 QB 258 where Megarry J said in regard to the last words of the subrule that they seemed to him to be very wide and to have special significance where, as in that case, most or all of the relevant facts were under the control of the plaintiff, and the defendant would have to seek to elicit by discovery, interrogatories and cross-examination those which would aid the defendant.'

So much for the law.

and they must surely apply to the present appeal. It is germane to note that the same case was reported in two other popular local journals, vide: [1998] 2 CLJ Supp 194; and [1998] 3 AMR 2791.

Hashim Yeop A Sani SCJ in *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183 said at p 184 of the report:

> If the court after considering the argument is satisfied that it is really unarguable then the court should grant summary judgment.

At p 185 of the report, his Lordship Hashim Yeop A Sani SCJ continued in serious vein:

> The underlying philosophy in the O 14 provision is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only be applied to cases where there is no reasonable doubt that the plaintiff is entitled to judgment. Order 14 is not intended to shut out a defendant. The jurisdiction should only be exercised in very clear cases.

In my judgment, the facts in the present appeal are plain and straightforward. It was not devious and crafty like those other complicated cases. There was no material for investigation by resorting to an open court hearing and it was certainly a fit case for summary decision (*Daimler Co Ltd v Continental Tyre & Rubber Co (Great Britain) Ltd* [1916] 2 AC 307). This was not a case where the appellant had, to borrow the words of Bramwell LJ in *Harrison v Bottenhelm* (1878) 26 WR 362 :

> ... though a man cannot show a defence, still, if he has shown enough to entitle him to interrogate the plaintiff, the case is not within O 14, and should not be pursued without his being allowed to defend.

Miles v Bull [1968] 3 All ER 632 was an entirely different case on a different scenario. In that case there were grounds for suspicion about the plaintiff's claim that constituted sufficient reason for there to be a trial of the action. In the present appeal there was no suspicion whatever about the respondent's case. That the respondent incurred expenses by purchasing the banker's cheque in the name of 'Ketua Pengarah Imigresen' for the benefit of the appellant and Lai Kee Kong cannot be doubted at all.

It is a correct assertion to say that the O 14 procedure was introduced in England way back in the 19th century for the sole purpose of enabling a plaintiff, by prompt action, to defeat a defendant who puts upon record his intention to defend by adopting a strategy to delay what is considered to be the inevitable. Halsbury LC in *Jacobs v Booth's Distillery Co* (1901) 85 LT 262 pragmatically said:

> There are some things too plain for argument; and where there were pleas put in simply for the purpose of delay, which only added to the expense, and where it had not been in aid of justice that such things should continue. Order XIV was intended to put an end to that state of things, and to prevent sham defences from defeating the rights of the parties by delay, and at the same time causing great loss to the plaintiffs who were endeavouring to enforce their rights.

Time has seen the procedure as promulgated by Halsbury LC in *Jacobs v Booth's Distillery Co* to be extended, but the original objective has always been maintained. The summary judgment procedure in O 14 of the Rules of the High Court 1980 ('the RHC') finds its counterpart in O 26A r 1(1) of the SCR which stipulates that:

> Where in an action to which this rule applies a statement of claim has been served on a defendant, the plaintiff may, on the ground that defendant has no defence to a claim included in the summons, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.

On the facts, the respondent was perfectly entitled to apply for summary judgment as it was apparent that the appellant had no defence to the claim at all. Documentary wise, the damning piece of evidence was the banker's cheque that was purchased by the respondent for RM126,000 in favour of the 'Ketua Pengarah Imigresen' and the receipt showed the name of the appellant and one Lai Kee Kong. This was my judgment and I so hold accordingly.

Lest I be accused of an oversight, I must now consider s 71 of the Contracts Act 1950 ('the 1950 Act'). On this section, the trial court made a passing reference to it in these words:

> If I am wrong in my conclusions on the law and on the facts, in my view the plaintiff is still entitled to succeed under s 71 of the Contracts Act.

But alas the statement of claim at pp 11 and 12 of the appeal record in encl 6 made no reference at all to s 71 of the 1950 Act. The two affidavits of the respondent in support of the application for summary judgment did not advert to nor refer to that section also. Clearly therefore the trial court had gone on a frolic of her own when she referred to s 71 of the 1950 Act to bolster up her judgment. These were the submissions of the learned counsel for the appellant.

By way of an addendum, I feel constrained to say something of s 71 of the 1950 Act. That section is worded in this way:

> Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person

A enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

and it is in pari materia with s 70 of the Indian Contracts Act. Section 71 of the 1950 Act is all encompassing. It enables a person who actually supplies goods or renders some service not intending to do so gratuitously to claim B compensation from the person who enjoys the benefit of the supply made or the services rendered. The payment of RM126,000 for the Immigration Department certainly benefitted the appellant and this must have prompted the trial court to invoke s 71 of the 1950 Act vigorously. I am constrained to say that that section embodies the equitable principle of restitution and the prevention of unjust enrichment and it seems that the government is C also bound by it (*State of UP v Chandra Gupta & Co* [1977] AA 28 at p 33; and *State of West Bengal v BK Mondal* [1962] Supp 1 SCR 376; [1962] ASC 779). Restitution seems to have been engrafted into our Contracts Act by the draftsmen and it is a cause of action which should have been embodied in the respondent's statement of claim but the failure to do so would not be fatal (*Aw Yong Wai Choo & Ors v Arief Trading Sdn Bhd & Anor* [1992] D 1 MLJ 166 where s 71 of the 1950 Act was not pleaded but his Lordship Peh Swee Chin J (as he then was) invoked it). Any obligation emanating under s 71 of the 1950 Act must necessarily run independently from the modern law of contract and the law of torts. Lim Beng Choon J in *Pembinaan KSY Sdn Bhd v Lian Seng Sdn Bhd & Ors* [1991] 1 CLJ 776 at E p 780 refused to strike out the statement of claim as it was possible that the plaintiff's action could rest on either tort or s 71 of the 1950 Act. The defendant there argued that the statement of claim should be struck out for lack of a cause of action but the learned judge refused to strike out the action on the ground that the action could lie in s 71 of the 1950 Act. The learned judge's refusal can be construed to mean that s 71 of the 1950 Act gives rise F to an independent cause of action. Two local authorities immediately come to mind when one discusses the implication of s 71 of the 1950 Act. In these two local authorities, that section has saved the day for the plaintiffs who were unable to establish contractual relationships with the defendants and thus preventing the plaintiffs from being remediless: *Kuan Leong Hin v State of Johore* [1941] MLJ 231 and *Perak Iron Mining Co Ltd v Chong Voon Kim* G [1962] MLJ 270. Again in the case of *Poomani v Associated Finance Corp Sdn Bhd* [1975] 1 MLJ 277, s 71 of the 1950 Act provided the remedy where the contract between the parties was found to be unenforceable. The case of *Siow Wong Fatt v Susur Rotan Mining Ltd & Anor* [1967] 2 MLJ 118 sets out four ingredients essential to give rise to an action under s 71 of the 1950 Act. It is said that the doing of the act or delivery of the thing by the person, H in this situation it is usually the plaintiff, must be:

(1) lawful;

(2) done for another person or individual;

(3) done with a non-gratuitous intent; and

I (4) the other party enjoys the benefit of the act or delivery of the thing.

The wording of s 71 of the 1950 Act in the present tense seems to point to the view that all the four ingredients must be strictly adhered to. If an

individual were to enjoy the doing of the act or delivery of the thing it presupposes that that individual has the choice, knowing fully well that the act or delivery of the thing is done with a non-gratuitous intent, either to accept or to reject the act or delivery in question. It is correct to say that the enjoyment must be during, and not after, the doing of the act or delivery of the thing. The fourth ingredient — the other party enjoying the work, was hotly debated in the case of *Kuan Leong Hin v State of Johore* [1941] MLJ 231. The facts of that case may be stated as follows. There the plaintiff was requested by the defendant under the government 'works orders' to clear part of the Muar river; the principal underlying objective was to prevent flooding above a certain point. The plaintiff was enthusiatic and proceeded further and beyond the scope of his work. The defendant merely paid for the work done under its 'works orders' and refused to pay for the additional work as there was no contract governing it. The learned judge found that the plaintiff lawfully performed the work for the defendant with a non-gratuitous intent and the learned judge too proceeded further and found that the defendant had enjoyed the benefit of the work done. The learned judge was influenced by the fact that the defendant's officer knew that the additional work was needed to prevent flooding at the time that the plaintiff did the work. Incidentally, the defendant's officer also verbally ordered the work. The defendant enjoyed that additional work as it prevented flooding. It was therefore unjust if the defendant did not pay for the value of the benefit.

The case of *Mohamed Yusoof v Murugappa Chettiar* [1941] MLJ 240 is another example where all the four ingredients were analysed. There the facts are quite interesting. Both the plaintiff and defendant were immediate neighbours. The plaintiff in compliance with the relevant building bye-laws built a party wall. Half of that wall was on the plaintiff's land and the other half on the defendant's. The wall comprised part of the plaintiff's house which was erected in the defendant's absence. Later the defendant erected his house and used the other half of the wall that was on the defendant land as part of his house. The learned magistrate decided in favour of the plaintiff and the High Court affirmed that decision on the ground that there was an implied contract to pay for half of the cost. The Court of Appeal, by a majority (Terell Acting CJ FMS and McElwaine CJSS), allowed the appeal as they were of the view that there was no contract and the claim under the then equivalent section of s 71 was not established. In fact the court there had to decide on s 70 of the Contract Enactment (Cap 52).

Gunn Chit Tuan J (as he then was) in *New Kok Ann Realty Sdn Bhd v Development and Commercial Bank Ltd, New Hebrides (In Liquidation)* [1987] 2 MLJ 57 held that the principle of unjust enrichment was in effect the basis of ss 69 and 70 of the Indian Contract Act (in pari materia with our ss 70 and 71) and these sections were said to be wider in scope than the principle as applied in England.

Restitution means to cause the restoration of a thing, the enrichment or benefit, or its money's worth received by the defendant from the plaintiff and at the expense of the plaintiff. Three enquiries must be posed, in the context of the present appeal, to determine unjust enrichment on the part of the appellant:

A (a) was the appellant enriched by receiving a benefit?

(b) if the answer is in the positive, the next question would be: was that benefit received at the respondent's expense?

(c) if the answer is also in the affirmative, then the question to pose would be: was the retention of the benefit unjust?

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and, in my judgment, the answers to all these questions would be in the positive. Certainly the appellant benefitted at the respondent's expense.

Basically, the underlying principle governing s 71 of the 1950 Act is the prevention of unjust enrichment. The future augurs well for restitutionary action under this section. Edgar Joseph Jr J (now FCJ) in *Tan Lay Soon v Kam Mah Theatres Sdn Bhd (Malayan United Finance Bhd, Intervener)* [1992] 2 MLJ 434 at p 444 was inclined to invoke ss 70 and 71 of the 1950 Act to enable a purchaser of properties to be reimbursed for the advances he had paid for the discharge of a charge on properties which the chargor was to retain. There was no necessity to plead s 71 of the 1950 Act and that section would be vigorously applied provided the four ingredients have been proved to the hilt as was done by Peh Swee Chin J (as he then was) in *Aw Yong Wai Choo & Ors v Arief Trading Sdn Bhd & Anor.* His Lordship Peh Swee Chin J (as he then was) in that case granted specific performance to the plaintiffs there as he was troubled that the plaintiffs should 'gain more than what they had bargained for and get away with it.' His Lordship also knew that the plaintiffs there 'stood to gain and enjoy a benefit ie houses of superior quality by virtue of superior specifications.' To solve his predicament, his Lordship resorted to and invoked s 71 of the 1950 Act. His lordship was satisfied that all the ingredients have been fulfilled even though that section was not pleaded. His Lordship refused to order liquidated damages for the late delivery of the houses against the second defendant. In short, his Lordship had used the benefit gained as a set off against the claim for liquidated damages.

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In my judgment, even without the benefit of s 71 of the 1950 Act, the respondent stood on solid ground as the facts and circumstances would clearly point in his favour for a summary judgment. The result was quite obvious. The appeal should be dismissed with costs. The decision of the trial court upheld.

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Appeal dismissed.

Reported by Mohd Rizal Abidin

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